No. 83-1943

# In the Supreme Court of the United States

**October Term, 1983**

ROBERT M. CAVANAUGH,
*Petitioner,*

vs.

WESTERN MARYLAND RAILWAY COMPANY AND BALTIMORE AND OHIO RAILROAD COMPANY,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR UNITED TRANSPORTATION UNION AS AMICUS CURIAE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The United Transportation Union ("UTU") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consents of the attorneys for the respondents were requested but refused.

The interest of the UTU in this case arises from the fact that it is a national labor organization certified under the Railway Labor Act to represent employees of the nation's railroads in the classes or crafts of employment as switchmen, trainmen, conductors and employees in engine service. It represents over 160,000 members in train service in the United States. Each of these railroad workers is potentially affected by the circuit court's holding that

a carrier may maintain a claim for property damage to the carrier's equipment based upon the employee's negligence as a counterclaim in an action brought by the employee seeking damages for personal injuries under the Federal Employers Liability Act, 45 U.S.C. § 51 et seq. This holding is in direct conflict with the contrary holding of the Supreme Court of Washington, disallowing a property damage counterclaim in an FELA action. *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980). The allowance of such a counterclaim, or of a direct action against the employee for property damage, has a severe and chilling effect upon the ability of UTU's members to enforce their rights under the FELA.

Also, UTU's members enjoy rights under the Railway Labor Act, 45 U.S.C. § 151 et seq., which provides the exclusive mechanism for resolving minor disputes between employers and employees within the railway industry. A property damage action—whether directly brought or by way of counterclaim—is precluded by the Railway Labor Act. To allow such litigation will frustrate the salutary purpose of the Act to facilitate settlement of all railway disputes and will encourage frequent resort to the assertion of claims outside the framework established by the Act. In this way, the circuit court's holding has an immediate effect upon every railroad worker and upon the railway industry as a whole.

In the instant case, both in the court of appeals and in his petition, petitioner's contentions focus on the FELA and do not include the preclusive effect of the Railway Labor Act upon common law actions brought by carriers against their employees. The brief which *amicus curiae* is requesting permission to file will contain arguments concerning the preclusive effect of the Railway Labor Act upon such common law claims, asserted either in a

counterclaim to an FELA action or in a separate action. If this argument is accepted, it would be dispositive of this case.

Respectfully submitted,

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## BRIEF FOR UNITED TRANSPORTATION UNION AS AMICUS CURIAE

## INTEREST OF THE UNITED TRANSPORTATION UNION

The interest of the United Transportation Union is set forth in the motion for leave to file this brief amicus curiae in support of the position of petitioner.

## SUMMARY OF ARGUMENT

I. The right of a railroad worker to seek redress for personal injuries caused by the negligence of his employer is governed exclusively by the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"). The FELA supplants state law with a uniform system of liberal remedial rules. *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371

(1953). The threat of economic coercion by railroad carriers is anticipated and remedied in the FELA by provisions which render void, *inter alia*, any "device whatsoever" by which the railroad may ultimately exempt itself from liability or which may prevent an employee from voluntarily furnishing information concerning a railroad injury or death. 45 U.S.C. §§ 55 and 60.

A counterclaim for property damage asserted by a carrier in an action brought by its employee under the FELA, or an independent action on this basis—both now sanctioned by the court of appeals—violate both the letter and spirit of the FELA. They constitute potent economic weapons, or "devices," by which the carrier may effectively exempt itself, in whole or in part, from liability to its employee under the FELA. The decision of the court of appeals, sanctioning these actions, is in direct conflict with the decision of the Supreme Court of Washington in *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980) (en banc). Certiorari should be granted to resolve this conflict and to avoid the disparity and uncertainty in the application of the FELA that would otherwise result, frustrating Congress' intent to provide a uniform system of recovery for injured railroad workers.

II. The opinion of the court of appeals, in deciding whether the railroad could counterclaim for property damage in an FELA action, reached the interrelated issue of whether railroads are entitled to initiate negligence actions against their employees for property damages. The court of appeals' summary resolution of this issue preordained its determination of the counterclaim question. The court, however, failed altogether to consider the preclusive effect of the Railway Labor Act, 45 U.S.C. § 151 et seq., on this issue. A significant issue contemplated within the questions framed by the petition for certiorari is thus whether

the Railway Labor Act preempts the availability of a carrier's negligence action against its employee for property damages.

The Railway Labor Act establishes an exclusive mechanism for resolving "minor disputes" between carriers and their employees. These dispute resolution procedures are mandatory and exclusive, preempting common law claims based upon the employment relationship. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972). The "minor disputes" remitted to negotiation and arbitration by the Railway Labor Act include claims "founded upon some incident of the employment relation, or asserted one, independent of those covered by collective agreement, e.g., claims on account of personal injuries." *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945). A carrier's claim for property damage based upon its employee's negligence occurring in the employment relationship is a "minor dispute," the resolution of which is committed to the grievance and arbitration procedures of the Act.

The legislative history of the Act and the pronouncements of this Court make it clear that the dispute resolution mechanisms of the Act were mandatory and exclusive, designed to preclude resort to other means of dispute resolution, including resort to the courts. *See Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). To allow the carrier's claim for property damage is contrary to the Railway Labor Act and defeats its salutary purpose of facilitating prompt and orderly settlement of all railway disputes. Certiorari should be granted to consider this significant issue crucial to the viability of the comprehensive statutory scheme Congress provided for this area so vital to national commerce.

## ARGUMENT

### I.

**The Decision of the Court of Appeals Raises a Number of Significant Issues, Never Resolved by This Court, Concerning the Construction and Operation of the Federal Employers' Liability Act. Moreover, the Resolution of These Issues by the Court of Appeals Conflicts Directly With Their Contrary Resolution by the Washington State Supreme Court, Presenting the Need for Resolution of This Conflict to Insure Uniformity in the Operation of the Act.**

The petition for certiorari, as well as the conflict between the majority opinion in the court of appeals and the dissent by Judge Hall—relying upon *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980) (en banc)—demonstrate that a number of significant and recurring questions concerning the construction and operation of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq., are raised. Permitting the carrier to assert in an FELA action a counterclaim for property damage based on the negligence of its employee, as well as to assert such a claim in an action initiated by the carrier—both recognized by the court below—is inconsistent with a number of provisions of the FELA as well as the policies it seeks to advance. The possibility of such counterclaims or separate actions—virtually unheard of until recently but now sanctioned by the court of appeals—will provide the railroads with a new and potent economic weapon that can and will be used to frustrate the rights of employees under the FELA, upsetting the careful balance between industry and labor in an area that is critical to national commerce. Moreover,

since the carrier's claim will be a creature of state law, the invitation posed by the court below will result in disparity and uncertainty in the application of the FELA, frustrating Congress' intent to provide a uniform system of recovery for injured railroad workers. Certiorari should accordingly be granted to resolve these substantial issues so vital to our national economy.

The FELA, "an avowed departure from the rules of the common law . . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 329 (1958). The Act imposes on carriers a liability to compensate "any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence" of the carrier. 45 U.S.C. § 51. It created a new federal remedy in derogation of common law, sweeping away a number of defenses such as assumption of risk, contributory negligence, and the fellow servant rule, which had left railroad workers to bear the burden of these injuries inherent in railroad work. "[T]he general congressional intent was to provide liberal recovery for injured workers . . . ." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). Moreover, "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Id.* Thus, the FELA, "supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act." *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953). *See Norfolk & Western R.R. Co. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980); 42 Cong. Rec. 4434 (1908) ("It is hoped to

fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees.")[1]

Amicus is concerned that the decision below allowing employer counterclaims and independent actions will undermine "the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers" and will frustrate the "uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361-62 (1952). Following the passage of the Act, one of its authors, Edward A. Moseley, first Secretary of the Interstate Commerce Commission, expressed concern about a forthcoming campaign against the Act by railroad lawyers:

> The railroad companies have the strongest array of legal talent in the country, and this talent will all be directed toward defeating the ends of any such law as this. No private individual can hope to cope with such power . . . .

Quoted in Griffith, *The Vindication of a National Public Policy under the Federal Employers' Liability Act*, 18 *Law & Contemp. Probs.* 160, 171 (1953). Congress attempted to respond to this problem by providing that "[a]ny contract, rule, regulation, *or device whatsoever*, the purpose or intent of which shall be to enable any common carrier to

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1. In addition to the FELA, Congress enacted the Safety Appliance Acts, 45 U.S.C. §§ 1-16, the Locomotive Inspection Acts, 45 U.S.C. §§ 17-23, and the Hours of Service Act, 45 U.S.C. §§ 61-66. These Acts were passed to promote the safety of railroad operations. *Urie v. Thompson*, 337 U.S. 163 (1949); *Carbon County Ry. Co. v. United States*, 309 F.2d 938 (10th Cir. 1962). The violation of these additional Acts result in liability under the FELA, and the railroad is held strictly liable in damages. *Myers v. Reading Co.*, 331 U.S. 477 (1947). These additional Acts are to be construed together with the FELA, and together with it, constitute a comprehensive statutory scheme for facilitating employee recovery. *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C. § 55 (emphasis added).

The authors of the FELA also "recognized the danger 'that railroad agents would coerce or intimidate employees to prevent them from testifying.' " *Stark v. Burlington N. Inc.*, 538 F.Supp. 1061, 1062 (D. Col. 1982), quoting *Hendley v. Central of Ga. R.R. Co.*, 609 F.2d 1146, 1150 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981). To meet this danger Congress provided that:

> [a]ny contract, rule, regulation, *or device whatsoever*, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information [shall be guilty of a crime].

45 U.S.C. § 60. Section 60 was designed "to attempt to equalize the access to information available to the highly efficient claims department of the railroads and to the individual F.E.L.A. claimants and to prohibit the promulgation and enforcement of rules which would inhibit the free flow of information to claimants." *Stark, supra* at 1062; *see* Sen. Rep. No. 661, 76th Cong., 1st Sess. 2, 5 (1939).

In these two provisions Congress used exceedingly broad language, including the phrase any "device whatsoever" to indicate that these safeguards were "to have the full effect that its comprehensive phraseology implies." *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949) (quoting *Duncan v. Thompson*, 315 U.S. 1, 6 (1942)). As

Judge Hall in his dissenting opinion below found, quoting from the unanimous en banc opinion of the Supreme Court of Washington in *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 159, 615 P.2d 457, 459 (1980), "the railroad's counterclaim and third-party claim constituted 'devices to deprive plaintiffs of their right to an adequate recovery and operated to chill justifiable FELA claims in violation of 45 U.S.C. §§ 55 and 60.' " *Cavanaugh v. Western Md. Ry. Co.*, 729 F.2d 289, 295 (4th Cir. 1984) (Hall, J. dissenting). There is serious concern that "the filing of such counterclaims will unfairly coerce or intimidate the injured employee from filing and pursuing his FELA action." *Id.* Indeed, counsel for the railroads in *Cavanaugh* candidly acknowledged at oral argument before the district court that railroads generally do not bring actions against their employees for property damage because they have no reasonable expectation of recovery and their employees in any event may be judgment proof, but that the counterclaim asserted in *Cavanaugh* was filed (approximately one year and nine months after the accident) only when the employee instituted his FELA action and in order to diminish his recovery. *Id.* at 295 n.1. In view of this, Judge Hall found it clear "that the railroads filed their counterclaim either to coerce Cavanaugh into settling his claim or, if his FELA action proceeded to trial, to strip him of any damages by means of an offset. I cannot agree that Congress intended to sanction such a motive." *Id.* Accordingly, Judge Hill wrote that:

> In my view, the railroads' counterclaim is a "device" calculated to intimidate and exert economic pressure upon Cavanaugh, to curtail and chill his rights, and ultimately to exempt the railroads from liability under the FELA. Here, as in *Stack*, the railroads' counterclaim violates 45 U.S.C. § 55 "because the ultimate threat of 'retaliatory' legal action would have

> the effect of limiting [the railroads'] liability by discouraging employees from filing FELA actions. Further, it would have the effect of reducing an employee's FELA recovery by the amount of property damage negligently caused by the employee." 94 Wash.2d at 160, 615 P.2d at 460. To allow the railroads' counterclaim to proceed would pervert the letter and spirit of the FELA and would destroy the FELA as a viable remedy for injured railroad workers. The result sought by the railroads, and accepted by the majority, defies common sense and is repugnant to the general goal of the FELA to compensate railroad workers for the injuries negligently inflicted by their employers.

*Id.* at 296.[2]

Whether a counterclaim in an FELA action such as the one involved in the instant case—concededly filed on a retaliatory basis to diminish the statutory right to recovery—constitutes a "device" to frustrate the purposes of the FELA in violation of 45 U.S.C. §§ 55 and 60, presents a significant question never resolved by this Court, and one on which there is a direct conflict between the decision of the court of appeals and the decision of the Su-

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2. *See also Shields v. Consolidated R. Corp.*, No. 81 Civ. 4204 (CBM) (S.D.N.Y. Dec. 16, 1981), Pet. App. 51a, 55a ("Allowing counterclaims such as the instant one would, in all likelihood, have the effect of discouraging employees from filing FELA actions for fear of being held liable in damages for the injuries suffered by fellow employees on the job. The mere possibility of this occurring casts an impermissible chill on railroad employees' FELA rights."); *Kozar v. Chesapeake & Ohio Ry. Co.*, 320 F.Supp. 335, 383 (W.D. Mich. 1970) ("If threats, coercion, economic pressure or other devices effectively curtail or deter an injured employee's resort to Federal Employers' Liability Act relief, or result in unjust settlements for injured employees and beneficiaries, then the purpose of Congress is thwarted and the individual is deprived of both his remedy and his forum, and injustice prevails.")

preme Court of Washington in *Stack*. The court of appeals' decision stands as an open invitation to railroads to utilize counterclaims or the initiation of independent lawsuits to chill the exercise of FELA claims, to deter the provision of information by witnesses who might themselves then be named as defendants in such actions, and to coerce inequitable settlements of claims, all in violation of the remedial purposes of the Act. This possibility[3] threatens

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3. That the increased utilization of counterclaims and independent actions by carriers against their employees in response to the recent invitation of the *Cavanaugh* court is not mere speculation is indicated by *Burlington N. R.R. Co. v. McNaulty*, No. 84-0162 (D. Wyo., complaint filed, April 24, 1984) (independent action by railroad against brakeman injured in railroad collision for property damage based on negligence and indemnification and contribution for amount carrier may be obligated to pay injured crew members of the involved trains).

The initiation by carriers of individual negligence actions against their employees, sanctioned by the court of appeals, also raises a substantial question under § 56 of the FELA, 45 U.S.C. § 56, which contains a three year statute of limitations, and provides a liberal venue provision giving plaintiffs a wide choice of forums. This venue provision has been recognized as "a privilege created by federal statute," *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 52 (1941); *see also Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949) (recognizing plaintiff's venue choice as a substantial right). In 1947 Congress considered a proposed amendment to limit the FELA plaintiff's venue privilege, which had been urged by the railroad industry. Congress rejected this proposed amendment, leaving intact the liberal venue privilege provided by § 56. *See* 93 Cong. Rec. 9103-07 (1947); H. R. Rep. No. 613, 80th Cong., 1st Sess., Pts. 1, 2 & 3 (1947); *id.*, Pt. 3, at 7 (remarks of Congressman Feighan in favor of maintaining liberal venue choice for FELA plaintiffs).

Allowing the railroad to file an independent action against its employee based upon the same occurrence giving rise to an FELA claim would totally undermine the employee's venue choice under § 56. *McNaulty, supra*, is illustrative. The railroad raced to the courthouse to file its action two days after the collision that injured the employee. If the carrier can file suit immediately, forum shopping on the part of the carrier to select a favorable jurisdiction, *e.g.*, one with a modified or pure comparative negligence standard, would become a general practice. In such cases the employee would be required to file a compulsory counterclaim in the forum selected by the carrier in order to preserve his FELA claim. This would totally frustrate

(Continued on following page)

the viability of a comprehensive statutory scheme to promote safety of railroad operations and liberal recovery for railroad employees suffering injury in the course of employment. Certiorari should accordingly be granted to resolve these significant and recurring issues.

II.

**The Decision of the Court of Appeals Raises Significant Issues Under the Railway Labor Act, Which by Establishing an Exclusive Grievance and Arbitration Procedure for Resolving Disputes Between Carriers and Their Employees, Precludes the Availability of a State Common Law Tort Claim for Property Damage Against an Employee Founded Upon the Employment Relationship.**

Not only is a state common law tort claim for property damage by the carrier against its employee inconsistent with the FELA, but it is also precluded by the grievance

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Footnote continued—

the forum selection privilege provided to FELA plaintiffs by Congress in § 56. *See Baltimore & O. R. Co. v. Kepner, supra.*

In *Kepner, supra,* the employee, an Ohio resident, filed an FELA action in New York. The carrier initiated an action in Ohio state court, invoking the common law power of the Ohio courts to enjoin the continued prosecution of an action in another forum by an Ohio resident where the plaintiff's choice of the other forum was vexatious and inequitable. This Court found that the FELA plaintiff's venue right conferred by § 56 could not be overcome by this otherwise legitimate state interest in preventing harassing litigation in inconvenient forums. For the same reason, the FELA plaintiff's venue right may not be frustrated by allowing a common law tort action by the carrier against his employee growing out of the same occurrence giving rise to an FELA claim. Congress enacted § 56 to avoid "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers, and parties away from their homes." *Baltimore & O. R. Co. v. Kepner, supra,* at 49-50; Sen. Rep. No. 432, 61st Cong., 2d Sess. 4 (1910). Allowing independent actions by the carrier would frustrate this policy as well as that of the three year statute of limitations accorded by § 56.

and arbitration procedure provided by the Railway Labor Act, 45 U.S.C. § 151, et seq., the exclusive mechanism for resolving minor disputes between employers and employees in the railway industry. The declared purpose of the Railway Labor Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." 45 U.S.C. § 151a(1). Congress established a mechanism "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5).

> The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. . . . The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.

*Slocum v. Delaware L. & W. R.R. Co.*, 339 U.S. 239, 242 (1950).

Grievance and arbitration procedures are established for "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." 45 U.S.C. § 153, First (i). Among the mechanisms established was the National Railroad Adjustment Board, "a congressionally designated agency peculiarly competent in this field." *Slocum*, *supra*, at 244. Although the statutory language at first reading seems to make referral of disputes to the Adjustment Board optional, and although the statute was so read in *Moore v. Illinois Cent. R.R. Co.*, 312 U.S. 630 (1941), this Court has repudiated that ruling

and held that the Act's dispute resolution procedures are mandatory and exclusive. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972) ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law."); *Walker v. Southern Ry. Co.*, 385 U.S. 196, 198 (1966) ("[T]he Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board"); *Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 39 (1957) ("[T]he provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field"). The board has "exclusive primary jurisdiction," *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 552 (1959), and is the "mandatory, exclusive, and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963).

As a result of the exclusive nature of this dispute resolution mechanism, no federal or state court has jurisdiction over the merits of any dispute subject to determination by the Adjustment Board. *Andrews, supra; Locomotive Eng'rs, supra*, at 37; *Pennsylvania R.R. Co., supra*, at 552-54; *Slocum, supra*. The Railway Labor Act thus preempts state law in this field and constitutes "a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum, supra*, at 244. The courts have accordingly dismissed common law actions brought in federal or state court asserting tort or contract claims based upon the employment relationship. *E.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972) (employee's claim for damages for alleged wrongful dis-

charge); *Jackson v. Consolidated R. Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984) (employee's state tort action for retaliatory discharge); *Choate v. Louisville & Nashville R.R. Co.*, 715 F.2d 369 (7th Cir. 1983) (employee's tort claim of intentional infliction of emotional distress); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978) (employee's claim of common law intentional infliction of emotional distress); *de la Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978) (employee's tort action for malicious deprivation of benefits); *Sharkey v. Penn Central Transp. Co.*, 493 F.2d 685 (2d Cir. 1974) (employee's claim for damages for mental distress based on wrongful discharge); *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D. Md. 1981) (employee's claim for false imprisonment and defamation); *Carson v. Southern Ry. Co.*, 494 F.Supp. 1104 (D.S.C. 1979) (employee's defamation claim); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274 (Ky. App. 1979) (employee's libel action).[4]

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4. The courts have consistently rejected the contention that the exception to the preemption doctrine recognized in the context of the National Labor Relations Act, 29 U.S.C. § 151 et seq., by such post-*Andrews* cases as *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), apply in the context of the Railway Labor Act. E.g., *Jackson v. Consolidated R. Corp.*, 717 F.2d 1045, 1052 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984) ("[T]he difference between the impact of the NLRA and the RLA has significance. The focus of the NLRA is on specific conduct that Congress has deemed subject to either prohibition or protection. . . . In contrast, the RLA has made any grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act, 45 U.S.C. § 153 First (i). It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA."); *Choate v. Louisville & Nashville R.R. Co.*, 715 F.2d 369, 370-372 (7th Cir. 1983); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367, 1369 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978); *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853, 855-57 (D. Md. 1981); *Pandil v. Illinois Cent. Gulf R.R. Co.*, 312 N.W.2d 139, 143 (Iowa App. 1981); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274, 281-83 (Ky. App. 1979).

Although these cases concerned common law actions brought by employees, it is plain that identical considerations support preclusion of common law actions brought by carriers when the subject matter of the action is committed to the grievance and arbitration procedure of the Act. *Order of Ry. Conductors of America v. Southern Ry. Co.*, 339 U.S. 255 (1950) (state court held without power to adjudicate dispute brought by a railroad); *see Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963) (either party may take dispute to Arbitration Board and "the other party may not defeat this right by resort to some other forum."); *Brotherhood of Railroad Trainmen v. Chicago R. & Ind. R.R. Co.*, 353 U.S. 30, 34 n.8 (1957) (statutory language supports no distinction); *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 725 n.18 (1945) ("the obligation [to negotiate and arbitrate] is not partial. In plain terms the duty is laid on carrier and employees alike").

The petition for certiorari in the instant case recognizes that the opinion of the court of appeals, in deciding whether the railroad could counterclaim for property damage in an FELA action, reached the interrelated issue of whether railroads are entitled "to initiate negligence actions against their employees for property damage . . . ." Pet. 10. The court of appeals' summary resolution of this issue preordained its determination of the counterclaim question. The court, however, failed altogether to consider the preclusive effect of the Railway Labor Act on this issue. A significant issue contemplated within the questions framed by the petition for certiorari is thus whether the Railway Labor Act preempts the availability of a carrier's negligence action against its employee for property damages. Plainly, under the authority discussed above, if such claims are remitted by the Railway Labor Act to the grievance and arbitration procedure established by the statutory scheme, then such property damage

claims, whether asserted by separate action or by counterclaim, would be preempted. The critical inquiry thus becomes whether such a claim for property damage based on negligence on the part of the employee constitutes a "dispute[] . . . growing out of grievances" within the meaning of the Railway Labor Act. 45 U.S.C. § 153 First (i).

The classic definition of the disputes remitted to the negotiation and arbitration procedures of the Railway Labor Act was set forth by this Court in *Elgin, J. & E. Ry. v. Burley,* 325 U.S. 711 (1945). This Court drew the traditional distinction in the railway labor world between major and minor disputes—both of which were committed to the dispute resolution mechanisms of the Act. *Id.* at 722-23. "Minor disputes" relate

> either to the meaning or proper application of a particular provision [of a collective bargain agreement] with reference to a specific situation *or to an omitted case.* In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

*Id.* at 723 (emphasis added). *See also id.* at 724 ("The so-called minor disputes, . . . involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so.")

Although the consequences of property damage caused through an employee's negligence is not usually the subject of a collective bargaining agreement, it does constitute an "omitted case" within the meaning of *Elgin.* It plainly

constitutes a claim "founded upon some incident of the employment relation . . . ." *Id.* at 723. Indeed, the very example offered by the *Elgin* Court—claims on account of personal injuries—is virtually identical.

As this Court indicated in reviewing the circumstances leading up to the 1934 amendments adding the Adjustment Board, "[p]rior to 1934 the parties were free at all times to go to court to settle these disputes." *Elgin, supra,* at 725. "The Adjustment Board was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision. The aim was . . . to safeguard the public as well as private interests against the harmful effects of the preexisting scheme." *Id.* at 727-28. Thus, after the 1934 amendments, the preexisting practice of resolving these disputes in court was to end. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and *out of the courts.*" *Union Pac. R. R. Co. v. Sheehan,* 439 U.S. 89, 94 (1978) (emphasis added); *Brotherhood of Railroad Trainmen v. Chicago R. & Ind. R.R. Co.,* 353 U.S. 30, 40 (1957).[5] *See also Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.,* 373 U.S. 33, 38 (1963) (right to invoke arbitration procedure may not be defeated "by resort to some other forum.").

Thus, a carrier's claim for property damage based on its employee's negligence on the job constitutes a minor

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5. *See also* 67 Cong. Rec. 4670 (1926) ("In the settlement of minor disputes you will thus see that the employees and the managers are to settle their controversies among themselves."); 67 Cong. Rec. 4525 (1926) ("I am honestly of the belief that there is not a dispute of any character which may arise but what can be settled under the provisions of this bill, if it is enacted into law; and, besides, when such cases are adjusted harmony and good will between the employers and employees will be preserved. . . . The rancor, the disappointments and dissatisfactions which usually follow in the wake of forced action or compulsion in any form will be removed by the provisions of this bill . . . .") (testimony of Mr. Doak, quoted by Congressman Mapes).

dispute committed by the Railway Labor Act to the exclusive jurisdiction of the Arbitration Board. The identical conduct by the employee that at common law would give rise to a tort action also constitutes grounds for discipline or discharge. Literally hundreds of property damage incidents, most of a minor nature, occur each day in the railroad industry. Every day employees are disciplined for rule violations resulting in such property damage. Grievances concerning discipline or discharge based on such negligent conduct of an employee are plainly committed to the negotiation and arbitration procedures of the Railway Labor Act. "Each party to the dispute may submit it [to the Arbitration Board] for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation." *Elgin, supra,* at 727. Sustaining the action of the court of appeals "would invite races of diligence whenever a carrier or a union preferred one forum to the other. And if a carrier . . . could choose a court instead of the Board, the other party would be deprived of the privilege conferred by . . . the Railway Labor Act . . . which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board." *Order of Ry. Conductors of America v. Southern Ry. Co.,* 339 U.S. 255, 256-57 (1950). Moreover, allowing the carrier to assert a property damage claim against its employee for negligence occurring in the employment relationship, either by separate action or by counterclaim in an employee's FELA action, would chill the exercise by employees of their right to assert the grievance and arbitration mechanisms provided by the Railway Labor Act. Employees would be coerced into accepting disciplinary sanctions out of fear that initiating a grievance to contest them would trigger a claim by the carrier for property damage.

Recognizing the availability of a common law negligence claim for property damage by the carrier against

its employee, as did the court of appeals, thus would frustrate the salutary purpose of the Railway Labor Act. The special nature of the railway industry and the historical context that served as the backdrop for the amendments to the Railway Labor Act "admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies." *Elgin, supra,* at 751 (Frankfurter J. dissenting). These problems "were certainly not expected to be solved by ill-adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration." *Id.* at 752. *See also id.* at 758 ("It misconceives the legislation and mutilates its provisions to read into it common law notions for the settlement of private rights.")

The court of appeals, without discussing the Railway Labor Act and the many cases construing it, thus acted in conflict with controlling decisions of this Court and adopted a rule of law inconsistent with the dispute resolution mechanism of the Railway Labor Act, as well as with the statutory scheme of the FELA.[6] Certiorari should be

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6. Inasmuch as the FELA provides a federal statutory right to the employee to recover for his employer's negligence, the employee's FELA action is, of course, not subject to preemption by the subsequently enacted Railway Labor Act. *E.g., Jackson v. Consolidated R. Corp.*, 717 F.2d 1045, 1049-51 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984); *Hendley v. Central of Ga. R.R.*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981); *Barnes v. Public Belt R.R. Comm'n*, 101 F.Supp. 200, 203 (E.D. La. 1951); *cf. Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (wage claims based on Fair Labor Standards Act, 29 U.S.C. § 201 et seq., not barred by prior submission of grievances to contractual dispute resolution procedures); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitrator's resolution of contractual claim not dispositive of Title VII claim). Read together the FELA and the Railway Labor Act thus constitute a comprehensive and coherent statutory scheme which remits minor grievances, including tort actions founded upon the

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granted to consider these significant issues in the construction and operation of the comprehensive statutory scheme governing our nation's railroad industry.

## CONCLUSION

For all of the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and should resolve these important issues of federal law.

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Footnote continued—

employment relationship, to the negotiation and arbitration process, with the exception of personal injury claims by employees based upon the negligence of the carrier, for which the FELA provides a special federal statutory remedy which takes into account any negligence on the part of the employee by reducing his award through a comparative negligence scheme. 45 U.S.C. § 53. With this exception, however, common law tort remedies are preempted, and may not be asserted either in separate actions or by counterclaim in an FELA action brought by the employee.